

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4190 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HAJI SULEMAN KHAFI,

Versus

STATE OF GUJARAT

Appearance:

MR KR JANI for Petitioner
Mr.P.S.Champaneri, A.G.P.,for resp.no.1 to 3
Mr.S.C.Patel for Respondent No. 4

CORAM : MR.JUSTICE S.M.SONI

Date of decision: 12/04/96

ORAL JUDGEMENT

Petitioner- detenu has filed this petition under Article 226 of the Constitution of India, challenging the legality, validity and propriety of the order of detention dated 17.2.87 served on the detenu on 5.4.95 passed by the specially empowered officer i.e. Additional Chief Secretary to the Government of Gujarat, Home

Department, in exercise of power under sub-sec. (1) of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), with a view to preventing the petitioner from abetting the smuggling of goods.

Along with the order of detention, the petitioner was also served with the grounds of detention and relevant documents. The grounds on which the order of detention came to be passed, in short, are as under:-

The officers of the Directorate of Revenue Intelligence received information on 24.12.86 that between the period of 24.12.86 and 25.12.86, smuggled goods are likely to land at sea-coast of Kodinar by one known smuggler Haji Haji Ismail Subhania of Salaya. Further details were also revealed in the information. The tanker referred to in the information, being Tanker no.MWF 4137 was intercepted. The same was driven by one Amriksingh Harnamsingh Gill and there were two other occupants. On search of the said tanker, certain contraband articles were found. The same were seized and the tanker was also seized. Statements of the driver as well as two others were recorded. In the statement of one Vilayathussain Badasaheb Nakvi, name of the present petitioner was revealed showing his involvement in the said smuggling activity by way of abetment. On being satisfied about the activity of the petitioner to abet the smuggling, the order of detention came to be passed. This order of detention is under challenge in this petition.

Learned Advocate Mr.Jani for the petitioner has pressed into service only the following ground, despite he has raised numerous grounds to challenge the legality and validity of the order of detention. The ground advanced and pressed in service is that there is undue and unexplained delay in deciding the representation of the petitioner. This delay has caused infraction of Article 22(5) of the Constitution of India and has vitiated the continued detention. The order of detention is, therefore, liable to be quashed and set aside.

Mr. Jani contended that the order of detention came to be served on the detenu on 5.4.95, when he was in Jamnagar Jail in connection with some another criminal matter. The detenu submitted his representation on 2.5.95 to the Jail authority. The said representation was addressed to the Advisory Board. The Jail authority forwarded the same to the Advisory Board on that very day. However, the same came to be decided on 26.6.95. Thus, there is undue and unexplained delay in deciding

the representation of the detenu.

Learned A.G.P. Mr.Champaneri to salvage the situation has come out with certain dates which are also stated in the additional affidavit filed by Under Secretary to the Government of Gujarat Miss G.K.Mehta. In para 3, which is in reply to ground 5(vii) of the amended petition, it is stated as under:-

"I say that the representation of the petitioner -detenu dated 2.5.95 addressed to COFEPOSA Advisory Board was received in Home Department on 14.6.95 from Advisory Board. I say that note was prepared by COFEPOSA section of the Home Department and put up before me on 15.6.95. I cleared the file on the same day and put up to the Deputy Secretary, who cleared the file on 16.6.95 and put up before the Addl.Chief Secretary (Home), who also cleared the file on 16.6.95 and submitted to the Hon'ble Chief Minister (Home). I further say that Hon'ble Chief Minister (Home) rejected the said representation on 26.6.95 and the decision thereon was conveyed to the petitioner - detenu on 27.6.95. I say that during the aforesaid period i.e. from 14.6.95 to 27.6.95, there were three public holidays, namely, 18th, 24th and 25th June 1995. I further submit that during this period, Hon'ble Chief Minister was busy with budget session of Assembly and was also on tour for two days. In view of this, the representation of the petitioner- detenu was considered carefully and promptly and there was no undue delay in considering the representation by the authority".

In view of this affidavit, explanation comes forth for the period from 14.6.95 to 26.6.95. So far as the period from 2.5.95 to 13.6.95 is concerned, Mr.Champaneri stated before the court that the representation of 2.5.95 received from the detenu, which was addressed to the Advisory Board, was sent to Advisory Board. The meeting of the Advisory Board was scheduled and convened on 4.5.95. The State Government received the information on 4.5.95 that a declaration under sec.9(1) of COFEPOSA is made by the Government of India on that very day, which the State Government received by fax on 8.5.95. The State Government, therefore, requested the Advisory Board on 8.5.95 to reconvene its meeting to consider the case of the detenu in the light of declaration issued by the Central Government. Accordingly, the Advisory Board

again convened its meeting on 2.6.95 and submitted its report to the State Government on 14.6.95. Mr.Champaneri, therefore, contended that in the light of the facts stated hereinabove, there is no delay, much less undue delay, on the part of the Government to consider the representation. He, therefore, contended that the order of detention is not vitiated on this ground.

Question for consideration is whether in the facts stated hereinabove, there is any undue and unexplained delay in deciding the representation or not. Mr.Jani, learned Advocate, contended that when the Advisory Board which held the meeting on 4.5.95 was again requested to reconvene the meeting on 8.5.95 by the State Government and when it was not known to the State Government of the next date to reconvene the meeting of the Advisory Board, there was no reason for the State Government not to consider the representation of the detenu even pending the reference of the Advisory Board. Mr.Jani, learned Advocate, contended that there is no bar in considering the representation of the detenu pending the reference to the Board, particularly when the date of the meeting of the Advisory Board was not known to the Government. Mr.Jani, therefore, contended that this delay from 2.5.95 or in any case from 8.5.95 till 13.6.95 is unexplained and that has caused infraction of Article 22(5) of the Constitution of India.

To substantiate his argument, Mr.Jani has relied on a judgment in the case of Moosa Husein Sanghar vs. State of Gujarat (Judgment Today 1993 (1) SC 44). The question before the Supreme Court in that case of Moosa was whether the authority can consider the representation of a detenu during the pendency of the Reference before the Advisory Board and the Supreme Court has, after considering the cases of K.M.Abdullam Kunhi vs. Union of India (A.I.R. 1991 SC 574 and others, held as under:-

"These decisions show that in a case where the representation has been received before the case is referred to the Advisory Board, the appropriate Government must consider the same before the matter is referred to the Advisory Board and it would be justified in not considering the same only if there is no reasonable time to consider and dispose of the representation before the case is referred to the Advisory Board and in such case, the representation may be forwarded to the Advisory Board along with the case of the detenu. In the instant case, we find that the representation

dated March 15, 1991 was received by the detaining authority on March 18, 1991 and the case of the appellant was referred to the Advisory Board on March 25, 1991 and the representation was actually considered by the Advisory Board on April 30, 1991. It is not the case of the respondents -and this is the important distinction in this case - that there was no time for the State Government to consider the said representation of the appellant before referring the matter of the appellant's detention to the Advisory Board on March 25, 1991 or before the said matter was considered by the Advisory Board. The only explanation that has been offered by the State Government is that there were holidays on March 23, 1991 and March 24, 1991 and there was hardly five days' time with the authorities between the time they received the representation of the appellant and the time the reference was made to the Advisory Board. The State Government has not given any reason to indicate that the said period was insufficient for a proper consideration of the representation of the appellant by the State Government. Moreover, even after the reference had been made on March 25, 1991, the representation of the appellant could have been considered by the State Government and it could have been forwarded to the Advisory Board along with the decision of the State Government on the said representation. Instead of adopting this course, the State Government forwarded the representation to the Advisory Board and took up the said representation for consideration after the receipt of the opinion of the Advisory Board and rejected it by order dated May 13, 1991. As a result, the representation of the detenu which was submitted on March 15, 1991 was considered by the State Government only on May 13, 1991. There was, thus, inordinate delay on the part of the State Government in considering the representation of the appellant and the said delay in the disposal of the representation of the appellant has rendered the continued detention of the appellant as illegal".

Learned A.G.P. Mr. Champaneri relied on the judgment of Abdulla Kunhi (Supra), contending that it is a judgment of the constitutional Bench and even if the point was not directly in issue, it has the binding effect. In Abdulla Kunhi's case, relevant observation,

on which Mr. Champaneri has relied, is in para 16, which reads as under:-

"We agree with the observations in Frances

Coralie Mullin case, AIR 1980 SC 849. The time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board, but there may not be time to dispose of the representation before referring the case to the Advisory Board. In that situation, the representation must also be forwarded to the Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu is referred to the Board. Even in this situation, the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of the report of the Advisory Board. Nor it could be said that the Government has delayed consideration of the representation, unnecessarily awaiting the report of the Board. It is proper for the Government in such situations to await the report of the Board. If the Board finds no material for detention on the merits and reports accordingly, the Government is bound to revoke the order of detention. Secondly, even if the Board expresses the view that there is sufficient cause for detention, the Government after considering the representation could revoke the detention. The Board has to submit its report within eleven weeks from the date of detention. The Advisory Board may hear the detenu at his request. The Constitution of the Board shows that it consists of eminent persons who are Judges or persons qualified to be Judges of the High Court. It is, therefore, proper that the Government considers the representation in the aforesaid two situations only after the receipt of the report of the Board. If the representation is received by the Government after the Advisory Board has made its report, there could then of course be no question of sending the representation to the Advisory Board. It will have to be dealt with and disposed of by the Government as early as possible".

Question before the Supreme Court in Abdulla Kunhi's case was as stated in para 5 of that judgment, which reads as under:-

"5.The principal question for consideration is whether the confirmation of detention order upon accepting the report of the Advisory Board renders itself invalid solely on the ground that the representation of the detenu was not considered and the subsequent consideration of the representation would not cure that invalidity. At the outset, it may be made clear that there is no argument addressed before us that there was unexplained delay in considering the representation of the detenu. Indeed, counsel for the petitioners very fairly submitted that they are not raising the question of delay. They also did not argue that the rejection of the representation after the confirmation of detention was not an independent consideration".

Thus, the Supreme Court in the case of Abdulla Kunhi (Supra) held that pending reference before the Advisory Board, representation of the detenu, if not decided, should not be considered to be vital and the time spent during the pendency of the Reference cannot be added to call it a delayed one while in the case of Moosa (Supra), Supreme Court has held that pending the Reference before the Advisory Board, there is no bar to decide the representation of the detenu by the concerned authority. It appears that in the case of Abdulla Kunhi, there was no time left with the authority on receipt of the representation to decide the same as reference was to be heard by the Advisory Board while in the case of Moosa, there appeared to be sufficient time with the detaining authority to decide the representation before making the Reference to the Advisory Board. In the case of Moosa, authority had about five days' time to consider the representation, which was not explained at all as to why the representation could not be decided within those five days and what the authority did to consider the representation within those five days while in the case of Abdulla Kunhi, a representation was made on 17.4.89 and as it required certain translations and collection of information, could not be decided before 20.4.89 when the meeting of the Advisory Board was to be held. Therefore, practically in the case of Abdulla Kunhi, there was no time for the authority to decide the representation while in the case of Moosa, authority had time of about five days to decide the same.

In view of the above state of affairs of the two judgments, in my opinion, the facts which emerge for consideration in the present case is when the representation was received by the authority on 2.5.95 and when the meeting of the Advisory Board was to be held on 4.5.95, it can be said that the case was governed by Abdulla Kunhi's case, but when the State received information that the declaration under sec.9(1) of the COFEPOSA is issued by the Central Government and in the light of that declaration when the State Government requested the Advisory Board to reconsider the case of the detenu on 8.5.95, at that point of time it was not known to the authority as to on what next date the meeting of the Advisory Board will be convened. At least it must have been known to the authority that a meeting of the Advisory Board cannot be convened instantly or immediately. In any case, before convening the meeting by the Advisory Board, a detenu is required to be given an intimation seven days in advance. So, this time was there with the authority and during this time, the authority could have considered the representation. There is no explanation forthcoming from the authority as to why the representation of the detenu was not considered during this period also. In my opinion, when there is a delay, which is not explained by the detaining authority as to why the representation was not considered during this period, there is an infraction of Article 22(5) of the Constitution of India and this vitiated the continued detention, which makes the order of detention illegal.

In view of the above discussion, the petition is allowed. The order of detention is quashed and set aside. The respondent no.3 is directed to set the detenu Haji Suleman Khafi at liberty forthwith, if not required in any other case. Rule made absolute. No costs.
